No. 2127 16

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

F. W. FICKETT,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the First Judicial District of the Territory of Arizona to the Supreme Court of the Territory of Arizona, Transferred to the United States Circuit Court of Appeals for the Ninth Circuit Under Section 33 of the Act of Congress Approved June 20, 1910 (36 Stat. 557,577), and Pursuant to Order Entered April 1, 1912, by Said Circuit Court of Appeals.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

No. C–2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Minute Entry of October 23, 1911—[Re Indictment].

Come now the grand jury aforesaid, and report a true bill of indictment against the defendant herein, charging him with the crime of interrupting and hindering by threats and by force the surveying of public lands of the United States, by a person authorized to survey the same by the Commissioner of the General Land Office of the United States.

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT.

Indictment.

In the District Court of the First Judicial District of the Territory of Arizona, the 23d day of October, one thousand nine hundred and eleven.

F. W. Fickett is accused by the Grand Jury of the United States of America, chosen, selected and

sworn within and for the First Judicial District of the Territory of Arizona, in the name and by the authority of the United States of [1*] America, by this indictment of the crime of interrupting, hindering and preventing by threats and by force the surveying of public lands of the United States, by a person authorized to survey the same by the Commissioner of the General Land Office of the United States, committed as follows: That the said F. W. Fickett, late of the First Judicial District aforesaid, heretofore, to wit: On or about the thirtieth day of August, A. D. one thousand nine hundred and eleven and within the First Judicial District of the Territory of Arizona, and within the county of Pima, in said Territory of Arizona, did unlawfully, willfully and feloniously by threats and by force, on the part of him the said defendant, F. W. Fickett, interrupt, hinder and prevent one Paul E. Fernald from making a survey of public lands of the United States of America, to wit: five certain unpatented mining claims, which said unpatented mining claims were then and there claimed and owned by Old Pueblo Copper Company, a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and known and described as follows, to wit: Little Betsy, Battle Axe, Quien Sabe, Quien Sabe No. 2 and Marion Mining Claims, which said mining claims are situate and being in the Amole Mining District, Pima County, Arizona Territory, he the said Paul E. Fernald being then and there a person authorized

*Page-number appearing at foot of page of original certified Record.

to survey the said public lands in conformity with instructions of the Commissioner of the General Land Office of the United States of America.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said F. W. Fickett, in the manner [2] and form aforesaid, and at the time and place aforesaid, did then and there commit the crime of interrupting, hindering and preventing by threats and force the survey of public lands of the United States by a person authorized to survey the same by the Commissioner of the General Land Office of the United States, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. E. MORRISON,
United States Attorney for the Territory of Arizona.

[Endorsements]: No. C–2306. In the District Court, First Judicial District Territory of Arizona. United States of America vs. F. W. Fickett. Indictment. A True Bill, F. L. Ewing, Foreman of the Grand Jury. Indictment No. ——. Witnesses examined before the Grand Jury: Paul E. Fernald. Presented to the Court in the presence of the Grand Jury by their foreman, and filed this 23d day of October, 1911. Allan B. Jaynes, Clerk.

Demurrer to Indictment.

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

F. W. FICKETT,

Defendant. [3]

DEMURRER.

Comes now the defendant, F. W. Fickett, and demurs to the indictment heretofore found against him on the 23d day of October, 1911, in said court, and for ground of demurrer says: That it appears upon the face of said indictment that the facts stated therein do not constitute a public offense against the United States of America, or at all.

WHEREFORE, defendant prays that this, his demurrer, be allowed and sustained, and that he be discharged, and for all proper orders and relief.

S. L. KINGAN,
Attorney for Defendant.

[Endorsements]: C-2306. In the District Court Arizona. United States of America, Plaintiff, vs. Arizona. United States of America, Plaintiff vs. F. W. Fickett, Defendant. Demurrer. Recd. copy

this 24th day of October, 1911. J. C. Forest, Asst. U. S. Atty. Filed Oct. 24, 1911. Allan B. Jaynes, Clerk.

No. C–2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Minute Entry of October 24, 1911—[Re Arraignment, Demurrer, Dismissal, etc.].

The United States Attorney being present, comes now the defendant herein, in person and with his counsel, S. L. Kingan, Esq., into open court, and upon being arraigned at the bar of this court upon the indictment herein, and said indictment being read to him, a copy whereof, with the [4] endorsements thereon, is handed to said defendant, who states that his true name is as set out in said indictment. And now, upon being called upon to answer thereto, said defendant filed a demurrer to the indictment. Argument of the respective counsel was had and the matter being fully submitted to the Court and the Court being fully advised in the premises, does sustain said demurrer. It is further ordered that this case be dismissed and that the defendant be discharged.

No. C–2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Minute Entry of October 25, 1911—[Notice of Appeal to Supreme Court of Territory of Arizona].

Comes now J. E. Morrison, Esq., United States Attorney, and gives notice of appeal from the order sustaining the demurrer to the indictment herein, to the Supreme Court of this Territory.

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Prayer for Appeal.

Comes now the United States of America, by Joseph E. Morrison, its attorney for the Territory of Arizona, and prays that an appeal to the Supreme Court of the Territory of Arizona be allowed and granted [5] by this Honorable Court from the judgment of said court in the above-entitled cause sustaining a demurrer to the indictment herein, ordering the dismissal of said indictment and the discharge of the defendant.

J. E. MORRISON,

United States Attorney for the Territory of Arizona.

[Endorsements]: No. C–2306. In the District Court of the First Judicial District of the Territory of Arizona. United States of America vs. F. W. Fickett. Prayer for Appeal. Filed Dec. 26, 1911. Allan B. Jaynes, Clerk.

[Motion for Extension of Time to Prepare Record, Bill of Exceptions, etc.]

In the District Court of the First Judicial District of the Territory of Arizona.

(Having and exercising the same jrisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.)

UNITED STATES OF AMERICA

vs.

F. W. FICKETT.

Comes now the United States of America, by its attorney for the Territory of Arizona and moves the Court that the plaintiff, the United States of America, be granted sixty days from the date of the filing hereof, within which to prepare transcript of record, bill of exceptions and statement of facts in the above-entitled cause. [6]

J. E. MORRISON,

United States Attorney for the Territory of Arizona.

[Endorsements]: No. C–2306. In the District Court of the First Judicial District of the Territory of Arizona. United States of America vs. F. W.

Fickett. Motion for Time to Prepare Transcript. Filed December 26, 1911. Allan B. Jaynes, Clerk.

[Order Allowing Appeal to Supreme Court of Territory of Arizona.]

FIRST MINUTE ENTRY OF DECEMBER 26, 1911.

No. C–2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

Comes now the United States of America by Joseph E. Morrison, its attorney for the Territory of Arizona, and prays that an appeal to the Supreme Court of the Territory of Arizona, be allowed and granted by this Honorable Court from the Judgment of said Court in the above-entitled cause sustaining a demurrer to the indictment herein, ordering the dismissal of said indictment and the discharge of the defendant. It is therefore ordered that said appeal be granted and notice of appeal entered.

[Order Granting Sixty Days from December 26, 1911, in Which to Prepare Transcript.]

SECOND MINUTE ENTRY OF DECEMBER 26, 1911.

No. C–2306.

UNITED STATES OF AMERICA

vs.

F. W. FICKETT,

Defendant.

It is ordered that the United States of America be granted sixty days from this date in which to prepare a transcript herein. [7]

[Certificate of Clerk, District Court, First Judicial District, Territory of Arizona, to Record.]

United States of America,
Territory of Arizona,
First Judicial District,—ss.

I, Allan B. Jaynes, Clerk of the District Court of the First Judicial District of the Territory of Arizona, do hereby certify that the above and foregoing seven (7) pages of typewritten matter constitutes a true, perfect and complete transcript of the Record in the case of the United States of America vs. F. W. Fickett, Defendant, No. C–2306, in said court, as the same appears from the original records of the same remaining in my office.

Witness my hand and the seal of said court affixed this 9th day of January, 1912.

[Seal] ALLAN B. JAYNES,
Clerk as Aforesaid. [8]

[Endorsed]: No. 2127. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. F. W. Fickett, Appellee. Transcript of Record. Upon Appeal from the District Court of the First Judicial District of the Territory of Arizona to the Supreme Court of the Territory of Arizona. Transferred to the United States Circuit Court of Appeals for the Ninth Circuit Under Section 33 of the Act of Congress, Approved June 20, 1910 (36 Stat. 557, 577), and Pursuant to Order Entered April 1, 1912, by said Circuit Court of Appeals.

Received April 5, 1912.

F. D. MONCKTON,
Clerk.

Filed April 15, 1912.

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

—VS—

F. W. FICKETT,
Appellee.

BRIEF OF APPELLANT

STATEMENT OF CASE

As appears from the transcript of the record filed herein, F. W. Fickett was indicted on 23rd day of October, 1911, by the Grand Jury of the United States of America, chosen, selected and sworn within and for the First Judicial District of the Territory of Arizona, for the crime of unlawfully interrupting, hindering and preventing by threats and by force the surveying of public lands of the United States, by a person authorized to

survey the same by the Commissioner of the General Land Office of the United States. [pp. 1, 2, 3, T. of R.]. The portion of the indictment specifically charging the crime, which, in our judgment, is all that will be necessary for the Court to consider, is as follows:

> "That the said F. W. Fickett, late of the First Judicial District aforesaid, heretofore, to wit: On or about the thirtieth day of August, A. D. one thousand nine hundred and eleven and within the First Judicial District of the Territory of Arizona, and within the county of Pima, in said Territory of Arizona, did unlawfully, wilfully and feloniously by threats and by force, on the part of him the said defendant, F. W. Fickett, interrupt, hinder and prevent one Paul E. Fernald from making a survey of public lands of the United States of America, to wit: five certain unpatented mining claims, which said unpatented mining claims were then and there claimed and owned by Old Pueblo Copper Company, a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona, and known and described as follows, to wit: Little Betsy, Battle Axe, Quien Sabe, Quien Sabe No. 2 and Marion Mining Claims, which said mining claims are situate and being in the Amole Mining District, Pima County, Arizona Territory, he the said Paul E. Fernald being then and there a person authorized to survey the said public lands in conformity with instructions of the Com-

missioner of the General Land Office of the United States of America."
(T. of R. p. 2).

On October 24, 1911, the defendant appeared in open court, and after arraignment, filed demurrer to the indictment. The demurrer was substantially in the following language:

"That it appears on the face of said indictment that the facts stated therein do not constitute a public offense against the United States of America, or at all."
(T. of R. p. 4).

On the said 24th day of October, 1911, argument having been made by the respective counsel, and the demurrer being submitted, the court made and entered its judgment sustaining said demurrer, dismissing the case, and ordering that the defendant be discharged. (T. of R. p. 5). On the 26th day of December, 1911, said date being within the same term of court during which the aforesaid judgment was entered, J. E. Morrison, United States Attorney for the Territory of Arizona, prayed an appeal to the Supreme Court of the Territory of Arizona, from the said judgment, (T. of R. pp. 5 and 6), which said prayer for appeal was allowed and granted by the Court on the same date, (T. of R. p. 7), and the United States of America was granted sixty days from said December 26, 1911, within which to prepare transcript of the record, in accordance with the statute in such case made and provided. [T. of R. p. 7].

ASSIGNMENTS OF ERROR

Assignment of Error 1.

The court erred, in sustaining the demurrer to the indictment, because the said indictment does state facts sufficient to constitute a public offense against the United States of America, whereas the Court held that it did not state facts sufficient to constitute any offense.

ARGUMENT

The indictment in this case was drawn under Section 2412 of the Revised Statutes of the United States, which is as follows:

> "Every person who in any manner, by threats or force, interrupts, hinders, or prevents the surveying of the public lands, or of any private land-claim which has been or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the Commissioner of the General Land Office, shall be fined not less than fifty dollars nor more than three thousand dollars, and shall be imprisoned not less than one nor more than three years."

The indictment charges, in the language of the statute, that the defendant and appellee d i d violate the provisions of said Section 2412. The

offense being purely a statutory one, the charging of the same in the language of the statute is sufficient. This proposition of law is so well settled that we do not think it necessary to cite authorities.

The judgment of the lower court should be reversed, and the case remanded with instructions to overrule the demurrer and proceed in the case as the law provides.

Respectfully submitted,

J. E. MORRISON,
UNITED STATES ATTORNEY.

J. C. FOREST,
ASS'T. UNITED STATES ATTORNEY.

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United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

—vs—

F. W. FICKETT,
Appellee.

BRIEF OF APPELLEE

F. W. Fickett was indicted for interrupting, hindering and preventing one Fernald from making a survey of five certain unpatented mining claims, claimed and owned by the Old Pueblo Copper Company, a corporation, the said Fernald being a person authorized to survey public lands, in conformity with instructions of the Commissioner of the General Land Office.

The indictment was demurred to on the ground that it did not charge an offense, and the demurrer was sustained.

The indictment was drawn under Section 2412 of the Revised Statutes of the United States:

"Every person who in any manner, by threats or force, interrupts, hinders or prevents the surveying of the public lands, or any private land claim which has or may be confirmed by the United States, by the persons authorized to survey the same, in conformity with the instructions of the

Commissioner of the General Land Office, shall be fined not less than fifty dollars nor more than three thousand dollars, and shall be imprisoned not less than one nor more than three years."

This statute interdicts the doing of two things:

1. Interrupting, hindering or preventing the survey of the public lands.

2. Interrupting, hindering or preventing the survey of private land claims which have been, or may be confirmed by the United States.

It will be conceded, we believe, at the outset, that a mining claim or location, is not a "private land claim," which has or may be confirmed, within the statute. Private land claims which have or may be confirmed by the United States, are a distinct and well known class of property, and have never, so far as we know, been held to include mining claims located under the mineral laws, and the fee to which is obtained by patent, and not confirmation. There is a wide distinction between a "private land claim," and a claim to lands, either private or public. Besides the indictment only refers to public lands.

The question is narrowed therefore to hindering, etc., the survey of the public lands, and whether or not a mining claim is public land. This, indeed, is the whole matter. The appellee is charged with hindering, preventing and interrupting one Fernald, he being a person authorized to survey public lands, (said Fernald being a deputy mineral surveyor), in the survey of unpatented mining claims, *claimed and owned* by the Old Pueblo Copper Company. If these mining claims are public lands the appellee would come within the statute; if they are not public lands, he would not.

Is then, a mining claim, located and held under the min-

eral laws, "public land," and within the fair meaning of the statute?

The indictment on its face is somewhat anomolous. Fickett is charged with interrupting the survey of public lands, and then it is recited that these lands are mining claims, and that they are claimed *and owned* by a private corporation. Can it be that property that has been granted by the United States, and is owned in private, is public land?

Public lands are lands of the United States to which no claim or right of another has attached. So soon as a private claim or right has attached to public lands such lands are no longer public, but are segregated, and in their nature private.

> "And by public land, as it has long been settled, is meant such land as is open to sale or other disposition under the general laws. All lands to which any claims or rights of others have attached do not fall within the designation of public lands."
>
> Bardon vs. Northern Pacific Railroad Co., 145 U. S., page 538.
>
> "In Willcox vs. Jackson, 13 Peters, 498, 513, this court held that whenever a tract of land has been legally appropriated for any purpose, from that moment it becomes severed from the mass of public lands and no subsequent law or proclamation or sale will be construed to embrace it or to operate upon it, although no reservation of it be made. The validity and effect of the appropriation do not depend upon its being subjected afterwards to cancellation because of omission of some particular duty of the party claiming its benefit.
>
> "In Witherspoon vs. Duncan, 4 Wallace, 210, 218, this court held that if a party entitled by law to enter land at the Land Office does so, when the certificate of entry is given to him a contract is ex-

ecuted between him and the Government, and thereafter the land ceases to be a part of the public domain." Ib.

Many other authorities might be cited to substantiate this proposition.

The grant by the United States to the locator of a mining claim under the mineral laws is of a much higher character than any rights given under either the preemption or homestead laws. By the preemption laws the United States simply declares that in case any of the lands were thrown open for sale the privilege to purchase would be first given to parties who had settled upon and improved them. No estate in the land was acquired by the claimant until the amount of purchase money was actually paid. The same doctrine applies to homestead claims. With reference to mineral lands the United States has declared that they are free and open to exploration and purchase, and a positive compact is made between the Government and the locator whereby the latter is clothed with the *exclusive* right of possession and enjoyment.

Lindley on Mines, Vol. 1, page 898, 2nd Ed.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located.

Forbes vs. Gracey, 94 U. S., page 767.

Gillis vs. Downey, 85 Fed., page 488.

"There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked these boundaries by stakes so that they could be readily

traced; they posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of and exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditure of a specified amount in developing it. Until the patent issued the Government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale."

Noyes vs. Mantle, 127 U. S., page 351.

"Where there is a valid location of a mining claim the area becomes segregated from the public domain, and the property of the locator."

St. Louis Mining Company vs. Montana Mining Company, 171 U. S., page 655.

It would be difficult in the light of these authorities to declare that property which has been segregated from the public domain and from the public lands, and which has been expressly granted to a citizen is still public land. As between the Government and the locator there is a statutory conveyance; the locator is a purchaser. The Government may no more interfere with his private property than could a citizen. The Government itself has taken the land conveyed by it from its public lands, and made it private land.

But it may be urged that the land remains public as against the Government notwithstanding the fact of conveyance, for the reason that before the owner may obtain patent it is necessary that the outline, or lines, of the owner's private property be surveyed by an officer of the government. Of course the owner of a mining claim never

need patent it. In case he never does, then what is his mine, public land, or private property? If he does decide to obtain a patent, how does this in any way effect his title? It is whether private rights have vested that determines whether land is public or private, and not whether the lines and boundaries of the land have been officially fixed. If the title be in the Government without the attachment of private rights, then the land is public. If a private right has attached, it is private. How could the applying for a patent or for a survey change the title or in any way effect its character? The actual issuance of the patent merely conveys the fee; the beneficial title, and the real title for all substantial purposes, has been previously granted.

And the Government has required that its own officers survey mining claims,—why? Not because they are public lands, but because they are segregated out of public lands, and the Government wants a record made by its own officers, to check off the lands. The Government merely wants to, and does, measure out, as it were, the property of which it has disposed.

Because the Government, having sold a locator a mining claim, reserves the right to measure the land sold, does not make the lands public lands. It is a paradox to say that the Government having granted land, that the land is still public for any purpose. Nor can there be any merit in the assertion that because in the survey of a mining claim the public lands adjoining it are incidentally, and in part surveyed, that such is a survey of public lands, for the reason that it is the mining claim that is surveyed. There may or may not be public land adjoining a mining claim, and in any event, as before stated, it is the mining claim that is to be surveyed, and not the surrounding country.

Consider where the theory of the law as evidenced in this indictment would lead: "A" owns a mining claim; it is his.

He decides to have it surveyed for patent, and he makes a contract with a deputy mineral surveyor. "A" is to pay this surveyor. After he has applied for the survey, and it is ordered, no difference what his financial or other condition might be, "A" could not stop the survey, and if he did in any way attempt to stop the deputy from surveying his ground, he would be guilty of a felony. If "A," after asking for a survey, should find that his property is not what he thought it was; if he found that what he thought was a mine, was only a hole in the ground and worthless, and if he should attempt to stop the survey, and save further expense, he would be guilty of a felony. And although it is not, of course, in the record here, I cannot refrain from setting out a few facts in the present case: As alleged in the indictment the Old Pueblo Copper Company owns the mining claims in question. Mr. Fickett was the General Manager of this company, and one of its largest stockholders, and he did not want the ground surveyed for patent at the time, for weighty reasons, and endeavored to stop the survey. To send a man to the penitentiary for such an action, and under the statute here invoked, would indeed be going very far.

This statute was enacted in 1830, long before the mineral resources of the West were dreamed of, or the mining laws enacted. It was meant to apply to the public lands,—lands owned and controlled by the United States alone, and to which no private rights had attached. It has no application to the survey of private lands such as mining claims.

The mining claims then, the survey of which the appellee is charged with interrupting, were private lands; they were lands owned by the Old Pueblo Copper Company; they were not public lands in any sense of the term; they were owned in private, the mere naked fee being held in trust by the United States.

The judgment of the lower court, therefore, in sustaining the demurrer should be affirmed.

Respectfully submitted,

S. L. KINGAN,
Attorney for Appellee.

United States Circuit Court of Appeals
For the Ninth Circuit

United States of America,
Appellant.

vs

F. W. Fickett,
Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

It is, of course, conceded that a mining claim is not a private land claim within the meaning of that expression as used in Section 2412 Revised Statutes of the United States, under which the prosecution in this case was initiated.

The appellee in his brief states that the language of the indictment is somewhat anomalous, in that it is charged that Fickett interrupted the survey of the public lands, which said lands were, then and there, mining claims and were claimed and *owned* by a private corporation. The question is then asked: "Can it be that property that has been granted by the United States and is owned in private is public land?" It is perfectly apparent from the language of this indictment, wherein it charges that the lands in question were unpatented mining claims, that the govern-

ment had not *granted* the said lands. .. We fail to see wherein the language is anomalous, as unpatented mining claims are most certainly claimed and owned, in so far as it is possible for private citizens or corporations to *own* the same, until patent from the United States be issued to the claimant or *owner* of the unpatented mining claim. The title to an unpatented mining claim is very different from the title to a patented mining claim. It is perfectly true that the locator of an unpatented mining claim and his assigns and successors hold a certain title, which is much greater in its scope than the right which is conferred by the United States upon the pre-emptor or the claimant under the homestead or desert land laws. It is also true that unpatented mining claims may be deeded, mortgaged, hypothecated, and are the subject of descent, but it is equally certain that during all the period while a valid mining claim remains unpatented, the paramount title, the fee, remains in the United States of America. Were this not the fact, the government would have nothing to convey and grant by its patent. This, of course, is so clear that we doubt if anyone would care to dispute it, although the appellee in his brief contends that the indictment, by its language, shows that the lands have been *granted* by the United States.

The question in this case is, as the brief of appellee states:

> "Is an unpatented mining claim, located and held under the United States mineral laws, public land within the meaning of the statute?"

The law, which is a United States statute enacted by the lawmaking power of the government itself, provides, in brief, that every person who in any manner, by threats or force, interrupts, hinders or prevents the surveying of the public lands * * * by the persons authorized to survey the same *in conformity with the instructions of the Commissioner of the General Land Office, shall be fined.* * * *,

An examination of the authorities cited by the appellee to support his contention that the mere location of a mining claim segregates it from the public domain and causes it immediately to cease to be a part of the public lands of the United States, discloses the fact that each of said cases were actions between private individuals or corporations. Of course, it is not contended that the location of a valid mining claim does not segregate the land within its boundaries from the public domain so far as anyone but the United States, the owner paramount of the land itself, is concerned. We have, without success, diligently searched the books to discover a single case wherein it has even been suggested that the segregation of land referred to in the cases cited by appellee covered the condition existing between the claimant of the public lands and the United States itself. It will not be disputed that the location of a valid mining claim gives the locator the entire right of possession, even as against the government itself, as long as the locator and his successors and assigns comply with the laws of the United States and the regulations of the Department of the Interior and General Land Office pertinent to such matters, and no longer. However, this position does not affect the point at issue in this case. Thus far, we believe, there is no difference of opinion between the appellee and the United States. The real point brought here for determination is whether or not:

> *as between the locator* of an unpatented mining claim and *the United States of America* the lands within the unpatented mining claim are public lands of the United States.

We contend that they are, and if so the demurrer in the court below should have been overruled. That the paramount title to the land embraced within the lines of unpatented mining claims is in the United States is specifically declared by Section 910 Revised Statutes of the United States, which is substantially as follows:

"That no possessory action between individuals * * * shall be affected by the *fact* that the *paramount title* to the land on which said mines are is in the United States * * *."

Quoting from the decision so strongly urged by the appellee, (Forbes vs. Gracey, 94 U. S. 762, 24 Law Ed. 313), it appears that the United States Supreme Court has specifically held that the real title in fee remains in the United States until patent is issued. The selling, encumbering and otherwise disposing of unpatented mining claims cannot and does not in any way affect or encumber the title of the United States, for, no matter what transfers, or encumbrances, or other disposition of lands within an unpatented mining claim have been made, the moment that the title which the locator secures by virtue of his location lapses and becomes forfeited, all such encumbrances, and transfers are, in law, dead and of no effect whatsoever, for they but affected the right which the locator had under the laws of the United States. The fee to the lands remains in the government until granted by its patent, and no act of the locator, or of those holding under him, or in succession, can in any way affect the paramount title so held by the United States.

"These claims may be sold, transferred, mortgaged and inherited *without infringing the title of the United States:*"

Forbes vs. Gracey, Id.

The Supreme Court of California, in discussing the character of the right or title held by the locator of an unpatented mining claim, says:

"Although the *ultimate fee* in our public mineral lands is *vested* in the *United States,* yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee and as a distinct vested right of property in the

claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons *but the United States,* as the owners of the land and mines therein."

Hughes vs. Devlin, 23 Calif. 502;

Watts vs. White, 13 Calif. 321.

"Prior to the issuance of a patent the locator cannot be said to own the fee simple title. The fee resides in the general government, whose tribunals, specially charged with the ultimate conveyance of the title, must pass upon the qualifications of the locator and *his compliance with the law.* Yet, as between the locator and every one else *save the paramount proprietor* the estate acquired by a perfected mining location possesses all the attributes of a title in fee, * * *. As between the locator and the government, the former is the owner of the beneficial estate, and the *latter holds the fee in trust,* to be conveyed to such beneficial owner upon his application in that behalf and *in compliance with the terms prescribed by the paramount proprietor.*'

Vol. 1 Lindley on Mines, 892.

Noyes vs. Mantle, 127 U. S. 348, 32 Law Ed. 168;

Dahl vs. Raunheim, 132 U. S. 260, 33 Law Ed. 324.

And it is only when a claimant has complied with all the proceedings *essential for the issue of patent* that he becomes the equitable owner of the mining ground.

Dahl vs. Raunheim, Id.

A reading of the above cited authorities shows that both the courts and the text writers, in defining the right, interest or title of the owner of a valid unpatented mining claim, are always careful to say that the paramount title

is in the government, and that, while the claimant may do almost everything with an unpatented mining claim that he could with property to which he held the fee, such transactions are but good between himself and individuals and corporations other than the government.

It is, therefore, apparent that the law is, and while there appears to be no express ruling on the subject, has been carefully, by implication, held to be that, as between the claimant and the government, the lands remain public lands of the United States until the issuance of patent. This must surely be so, for, under the general land and mineral laws of the United States, it is absolutely impossible for the government to convey anything but its public lands.

The statute under which this prosecution is pending provides that it is an offense to hinder the surveying of the public lands by the persons authorized to survey the same, *in conformity with the instructions of the Commissioner of the General Land Office.* It is provided by Section 2325 Revised Statutes of the United States, substantially, that a patent for a mining claim may be obtained by following the provisions of said section, among which is the following:

> "Any person * * * having claimed and located a piece of land for such purposes (mineral purposes) may file * * *, in the proper land office, an application for a patent, under oath, * * * together with a plat and field notes of the claim or claims in common, made by and under the direction of the United States Surveyor General, showing accurately the boundaries of the claim or claims * * *."

It is required by the regulations of the General Land Office that a survey of such claim shall be made, and that the plat thereof shall be filed in the proper land office, as required by the above cited section. It is thus found that the United States, notwithstanding the fact that it has given certain rights of quite an extensive character to locators of mining claims, still, in its statute, asserts as one of the conditions precedent to a patent that the Surveyor General

of the *United States* shall cause a survey to be made of the unpatented mining claim, and that the Commissioner of the General Land Office, acting as is his duty within and by the requirements of the above cited statutes, requires such survey to be made and the plat thereof to be filed in the proper land office. It appears to us that nothing could be more clear than that the land embraced within an unpatented mining claim is still the public land of the United States, otherwise the government would have no authority whatsoever to order, as a condition precedent to patent, that a survey, by its own Surveyor General, be made of the ground. The right of the United States to legislate and of its officer, the Commissioner of the General Land Office, to promulgate such regulations has never been, and, in our humble judgment, never can be questioned. Surveyor generals are officers of the General Land Office and fulfill their duties under the direction of the Commissioner of that office. Therefore, Congress having specifically required that this survey shall be made by the Surveyor General of the proper district, and such survey being also required by the regulations of the Commissioner of the General Land Office, it is perfectly clear that Section 2412 referred to all lands which might lawfully be surveyed by persons authorized to survey the same under the instructions of the Commissioner of the General Land Office, which is in exact accord with the language used in Section 2412.

The appellee contends that it is a paradox to say that, the government having *granted* land, the land is still public for any purpose. It has, we believe, herein been clearly shown herein that the government does not *grant* the land until it issues its patent. The argument of the learned counsel for the appellee is, therefore, in this particular, based upon an erroneous premise.

The reference made by the appellee to what might later appear to be the actual facts in the case has no place in this argument.

It is true that the statute under construction was enacted in 1830, but it must be recalled that the statutes of the United States were revised and the revision adopted in 1877, which was about five years after the passage of the Act of May 10, 1872, which latter act was the inception of the present mining laws of the United States, and which was incorporated, practically as it stood on the day of its adoption, into the revision of 1877. We think it quite apparent that it was intended that the statute under which this prosecution was commenced, having been included in the said revision and referring to all public lands, surveys of which might be lawfully made by officers of the government under the regulations of the Commissioner of the General Land Office, was intended to apply to the survey of unpatented mining claims.

Were it not the law that anyone interfering with a United States Mineral Surveyor, engaged in his duty and under the instructions of the general Land Office in surveying unpatented mining claims, should be guilty of an offense, the owner of an unpatented mining claim might never be permitted to go to patent, for anyone, interested or not, might, by force and threats, prevent any such Mineral Surveyor from making such survey. The object of the law is certainly a most praiseworthy one, and, should this Court hold that Section 2412 is not applicable, it leaves mineral surveyors and claimants of unpatented mining claims, desiring surveys for patent to be made, in a most unfortunate position.

In short, the contention of the appellant is that the lands within an unpatented mining claim are public lands within the meaning of Section 2412, because the paramount title remains in the government until the issuance of the patent; because the statutes of the United States expressly declare, as a condition precedent, that survey of such claims shall be made by and under the direction of the Surveyor General of the United States for the proper district; because the Commissioner of the General Land Office in his regula-

tions touching this subject requires, as he is by law compelled to do, a survey by said Surveyor General of said lands, thus bringing the lands within the exact language of the statute in question: because no court has ever yet held or suggested that unpatented mining claims, as between the claimant and the government, are not public lands; because, were said unpatented mining claims not public lands as between the claimant and the government, the United States could not, under the general land and mineral laws, convey such lands by patent.

Respectfully submitted,

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United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

—VS.—

F. W. FICKETT,
Appellee.

Appellee's Reply to the Reply Brief of Appellant.

For the reason that the appellant in its first brief did not state its case, but left the appellee uncertain as to what points it would rely upon, we feel that we have a right to reply to the reply brief of appellant. Appellant in its reply brief for the first time sets up its contentions, and were we not allowed a reply to these contentions we would be deprived, it seems to us, of a substantial right.

Appellant contends that the United States does not make a grant to the locator of a mining claim, and thence argues that the use of the word *owned* in the indictment, wherein it is averred that the unpatented mining claims in question are owned by a private corporation, does not imply a grant. As all unpatented mining claims belonged originally to the United States it is difficult to perceive how a locator could own an unpatented mining claim unless the United States, the original owner, granted to the locator something in the

way of title. To say that the lands all belong to the United States and are public lands, in the first place, and then to state that the locator owns the lands, and to claim in the face of these facts that there has been no grant from the original owner to the locator, is hardly logical.

The public mineral lands of the United States are open to sale and purchase, and when a locator makes a valid location he purchases the land and is a grantee of the United States, of such land. This is in no manner affected by the reservation of the fee by the United States, the Government merely holding such fee in trust. Originally the Government owned all the title,—the fee and the beneficial estate. When a mining claim is located the whole of the beneficial estate is granted, and the fee is merely held in trust, and this fee *must* be conveyed by the trustee to the beneficiary, without choice or discretion, when the beneficiary complies with the conditions prescribed by the statute, or, in other words, the terms of the trust. There is a grant then, and a grant of the real, substantial title,—the only thing reserved being the naked fee. Appellant was quite correct, therefore, in its indictment, to state that the unpatented mining claims were owned even against the Government itself, by the private corporation mentioned in the indictment.

It appears to us, with all respect for counsel upon the other side, that a confusion exists in his argument, in this: It is stated that the paramount title of the land itself remains in the United States, and that because the paramount title is in the United States it must follow that the lands are public lands. It appears to us that the paramount title has nothing to do with the matter, whether the lands are public or not.

What are the relations between the locator and the Government? The Government is a vendor offering its property for sale upon certain conditions. When the first pay-

ment is made, that is to say, when the Statute in regard to the location of mining claims, is complied with, the Government agrees to, and does vest in the locator or purchaser the whole of the beneficial title to the land. A conveyance of this title is actually then made by virtue of the Statute. The relation of vendor and vendee then and there exists,—the purchaser is clothed with rights of purchase as against the Government itself, and the Government cannot divest these rights. The naked legal fee is held by the vendor, and how is it held? The vendor is a trustee of the vendee, and holds the title for the use and benefit of the vendee, and must convey it upon the vendee's request, and his performance of the statutory requirements. We thus have land actually sold and conveyed, save and except that the fee is held in trust and held in trust for the sole use and benefit of the vendee.

The question is: Are lands which have thus been sold by the Government public lands? And not whether the fee is held in trust by the Government. With the definitions of public lands before us it is difficult to see how the United States can claim, as between itself and the purchaser, that it has granted the land and merely holds the fee in trust, and yet that the lands are public lands. They are certainly not open to sale or disposal, and why? Because they have already been sold. Can it be seriously urged that the Government can take the position that it has sold lands, and yet, as between it and its own vendee, the lands are public, merely because the Government holds the fee in trust and for the sole use and benefit of its vendee?

The quotations made by appellant, namely, from Hughes vs. Devlin, 23 California, 502, and Watts vs. White, 13 California, 321, merely show or aver the familiar doctrine that as between all persons except the United States the title granted by the Government to the locator is treated as a fee simple title, and of the same effect is the quotation from

Lindley, Volume 1, page 892. As between the Government and the locator, as said by Mr. Lindley, and by the courts, the relation is that of trustee and *cestui que* trust.

How is this relation brought about? If there was no grant, and if the lands were still public, how could a person who owns the whole title, legal and equitable, become the mere trustee of the naked title, unless that owner who first held all, had granted everything but the naked legal fee, and merely held that in the capacity of trustee? Of course there must have been a grant, and a grant of everything, save and except the naked fee, and if there was a grant, there must have been a purchaser, and that purchaser must have acquired everything but the one thing reserved, namely, the naked fee. It can hardly be said then, that lands which were public and which were sold by their owner, (that owner merely reserving, and as trustee, the fee,) are still in the same category and class that they were originally in, namely, "public lands." The very character and nature of the lands have been changed by the grant, and what was public has become private, and this as between the grantor and the grantee.

Appellant says: "It is therefore apparent that the law is, and, while there appears to be no express ruling on the subject, has been carefully, by implication, held to be, that as between the claimant and the Government, the lands remain public lands of the United States until the issuance of patent. This must surely be so, for, under the general land and mineral laws of the United States, it is absolutely impossible for the Government to convey anything but its public lands."

We believe appellant to be quite correct in saying that there has been no ruling or decision that mining claims remain public lands of the United States until the issuance of patent. We likewise, know of no such decision. Nor do

we know of any case that by implication, however remote, holds that a mineral claim properly located is still public land of the United States. The fact that the fee remains in the Government is of no importance. Take a homestead entry which has been completed and finally proved up upon, and final receipt issued. In this instance the fee is still in the Government, but would it be urged for a moment that the lands were still public lands? Is it not true that there are many, many decisions, and of the highest courts, that hold just the contrary, and declare that when the homestead entryman has obtained his final receipt that he is the owner of the land, and may do what he pleases with it, and that the Government merely holds the fee in trust, to be conveyed to him as soon as may reasonably be done? It is, of course, true that the United States may only convey public lands, but the question is, *when* does it convey the lands? In the case of a mining claim it conveys the lands when the location is made, merely reserving the naked fee as trustee, and this to be conveyed without choice or discretion, when the statutory requirements are complied with.

Appellant again states that the land within an unpatented mining claim is still public land,—must be,—otherwise the Government would have no authority to order as a condition precedent to title, that a survey be made of the ground. The fact that the Government makes it a condition, precedent to the granting of the fee which it holds in trust, that a survey be made, can have, it seems to us, nothing whatever to do with the question whether the land is public or private. The character of the land as to public or private, has been fixed and determined by the original grant made by the locator long before the question as to the official survey could arise. One of the conditions of the granting of the fee held in trust, is that a survey be made, and that is all.

The judgment of the lower court is correct, and should be affirmed.

Respectfully submitted,

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Attorney for Appellee.